In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1091

GEORGE ROWELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-6118

CHARLES MATHEWSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-6136

GEORGE KILLIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Rowell contends that the evidence was not sufficient to support his conviction. Petitioners Killian and Mathewson contend that the court erred in admit-

ting evidence of activities occurring after termination of the conspiracy and that certain of the prosecutor's opening remarks were improper.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Killian and Mathewson were convicted of having conspired to distribute a controlled substance and of having possessed a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Rowell was convicted only on the conspiracy count. Petitioners Killian and Mathewson were each sentenced to four years' imprisonment and two years' special parole on each count. Petitioner Rowell was sentenced to five years' imprisonment and two years' special parole. The court of appeals affirmed on December 29, 1975 (Pet. App. A).[1] The petitions in No. 75-6136 (Killian) and No. 75-1091 (Rowell) were not filed until January 30, 1976, and February 2, 1976, respectively, and are therefore out of time under Rule 22(2) of the Rules of this Court. The issues raised in the petitions do not, in any event, warrant further review.

The evidence at trial showed that Special Agent Douglas Driver of the Drug Enforcement Administration met with Richard Turner, Fontain Fitch and petitioner Charles Mathewson on July 6, 1974, in Jacksonville Beach, Florida, and purchased one ounce of phencyclidine hydrochloride (PCP) for $1,650. On July 15, 1974, Driver again contacted Turner to purchase eight additional ounces of PCP.[2] Turner said he only had two ounces of PCP on hand, and that he would have to get the remainder from his source of supply in Detroit, Michigan (Tr. 345-348).

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[1]All citations to the court of appeals' opinion refer to the appendix in No. 75-1091.

[2]Turner ultimately pleaded guilty to conspiracy to distribute a controlled substance, and was sentenced to three years' imprisonment.

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On July 22, 1974, Turner agreed to sell Driver approximately two ounces of PCP. Upon arriving at Turner's home to complete the sale, Driver found several other individuals present, including petitioners Mathewson and Killian. Killian asked Driver whether he was still interested in purchasing a total of eight ounces of PCP. Killian stated that although he did not have eight ounces of PCP on hand, he could guarantee delivery the next morning (Tr. 349-351). Immediately after this conversation, Turner and petitioners Mathewson and Killian were arrested.

After the arrests, petitioner Rowell called Turner's apartment attempting to locate Mathewson. The agent who spoke with Rowell stated that Mathewson was unavailable and offered to take a message. Rowell stated that he needed to talk to Mathewson before 9:00 p.m. to determine whether Mathewson wanted him "to get on the plane" (Tr. 353). During the evening, Rowell made three more calls in an effort to locate Mathewson; during the last call, Rowell told Agent Robert Starratt the time and flight number for his arrival in Jacksonville (Tr. 331). Several undercover agents met Rowell at the airport, at which time Rowell stated he had left Detroit with 50 "hits" of PCP but that he had given them away on the plane (Tr. 356). Rowell was then arrested.

1. Petitioner Rowell's contention that the evidence was not sufficient to support his conspiracy conviction is without merit. As the court of appeals observed (Pet. App. 5), the record contained the following evidence from which the jury could reasonably have concluded that Rowell was a member of the conspiracy:

> Rowell freely indicated that he had arrived from Detroit; there was undisputed testimony previously given that the PCP source was in Detroit; that his name was George; that he was arranging a meeting

with Mathewson and Rick Turner at the very time that the latter two had just been arrested in connection with the seizure of the PCP in Jacksonville; that he started South with a quantity of PCP and clearly indicated that he was expected by some of the other conspirators.[3]

2. Petitioners Killian and Mathewson contend that the court erred in permitting evidence to be introduced concerning activities of and statements made by Rowell after their arrests. This contention was carefully considered and properly rejected by the court of appeals (Pet. App. 5-6):

> In the first place, we note that counsel did not request the trial court to give a limiting instruction to the jury—that is to say they did not ask the court to tell the jury that whatever Rowell had to say after his arrival was admissible only as against him and could not be considered on the question of guilt or innocence of the others. No such instruction was requested because, as commented on by the trial court, counsel seemed to consider that it might do them more harm than good.
>
> We recognize, of course, that even the giving of a limiting instruction may not be sufficient where a co-defendant's confession in a joint trial so clearly implicates the complaining co-defendant as to make it impossible for the jury to consider it only against the defendant who made it, *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968); *United States* v. *Maddox*, 492 F.2d 104 (5 Cir. 1974).

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[3]Rowell contends that the statements he had made were insufficient to connect him to the conspiracy. As the court of appeals noted (Pet. App. 5), however, Rowell's statements were only one of the elements of proof linking Rowell to the conspiracy. See *Smith* v. *United States*, 348 U.S. 147, 156.

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> The real substance of the matter here is, however, that while Rowell's statement was sufficient to tie him in to the conspiracy already so overwhelmingly proved against Killian and Mathewson, it really had no significant impact as to the existence of that conspiracy. It added nothing to the proof of the actual purchases, and offers for sale by the other conspirators fully testified to by the Government agents. The only point illuminated by Rowell's testimony was that in addition to the overwhelming proof of guilt of the others, Rowell simply tied himself in as a participant with that guilty conduct. For this reason, Rowell's testimony was hardly relevant, but if relevant at all, it was clearly without prejudicial effect and harmless beyond a reasonable doubt.

3. Petitioners Killian and Mathewson also contend that the prosecutor improperly asserted during his opening statement that the government would introduce evidence of a conversation in which petitioner Rowell had stated that he was the source of supply for the PCP that Mathewson was selling and that he had sold Mathewson a great deal of PCP. During the trial, the court ruled evidence of this conversation inadmissible and, as a consequence, no evidence of the conversation was offered. But Killian and Mathewson did not object to the prosecutor's statements at the time they were made or at the time the evidence was ruled inadmissible; instead, they delayed objecting to reference to the conversation until the conclusion of the trial (Tr. 437-439).

Even assuming that the prosecutor erred in referring to the conversation during his opening statement, the reference was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18, 24. In view of the fact that petitioners' possession and intent to distribute PCP was established by testimony concerning their sales

to and negotiations with Special Agent Driver, the prosecutor's reference to a conversation showing that Rowell was Mathewson's source of supply could have added little, if anything, to the weight of the evidence against them. Had Killian and Mathewson believed otherwise, they should have objected to the reference to the conversation at the time it was made or at the time evidence concerning the conversation was ruled inadmissible. Furthermore, the trial court instructed the jury on three separate occasions that statements of counsel were not to be regarded as evidence and that the guilt or innocence of the defendants could be determined only on the basis of the testimony of the witnesses who appeared at the trial (Tr. 94, 508, 574).

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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